No.

In The

Supreme Court of the United States

October Term, 1996

In re:

DENISE RENEÉ BEASLEY.

FIDELITY FINANCIAL SERVICES, INC.,

Petitioner,

vs.

RICHARD V. FINK, Trustee,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether Fidelity Financial Services acquisition of a purchase money security interest in the debtor's automobile constituted a preferential transfer which the bankruptcy trustee could avoid pursuant to 11 U.S.C. § 547.

LIST OF PARTIES

Denise Renee Beasley - Debtor

Richard V. Fink - Trustee in Bankruptcy

Fidelity Financial Services, Inc. - Creditor

Fidelity Financial Services, Inc. is a wholly owned subsidiary of Bank of Boston Corporation.

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In Re Beasley, Fink v. Fidelity Financial Services, Inc., 102 F.3d 334 (8th Cir. 1996).

STATEMENT OF JURISDICTION

This Petition for Certiorari is for the purpose of seeking review from the United States Court of Appeals for the Eighth Circuit decision in *In Re Beasley, Fink v. Fidelity Financial Services, Inc.*, 102 F.3d 334 (8th Cir. 1996). The Court of Appeals entered its Order on November 27, 1996. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on a Writ of Certiorari the Eighth Circuit decision referenced above.

STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 547:

* * *

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property —

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made —

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider;

(5) that enables such creditor to receive more than such creditor would receive if —

(A) the case were a case under chapter 7 of this title [11 USCS §§ 701 et seq.]

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title [11 USCS 101 et seq.]

(c) The trustee may not avoid under this section a transfer —

* * *

(3) that creates a security interest in property acquired by the debtor —

(A) to the extent such security interest secures new value that was —

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property;

*** * ***

(e) (1) For the purposes of this section —

*** * ***

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) for the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made —

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time except as provided in subsection (c)(3)(B);

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of —

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transfer and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

Mo. Rev. Stat. 301.600

* * *

2. A lien or encumbrance on a motor vehicle or trailer is perfected by the delivery to the director of revenue of the existing certificate of ownership, if any, an application

for a certificate of ownership containing the name and address of the lienholder and the date of his security agreement and the required certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within thirty days thereafter, otherwise as of the time of the delivery.

STATEMENT OF THE CASE

A. Nature of the Case

This is a bankruptcy proceeding in which Fidelity Financial Services, Inc., ("hereinafter Fidelity") is attempting to enforce its rights as a secured creditor of the debtor, Denise Renee Beasley. The Trustee in Bankruptcy, Richard Fink, sought to avoid Fidelity's security interest as a preferential transfer under 11 U.S.C. § 547. The Bankruptcy Court, District Court and Eighth Circuit have all ruled in the Trustee's favor.

B. Course of Proceedings

The debtor filed a petition under Chapter 7 of the Bankruptcy Code on November 18, 1994. United States Bankruptcy Court, Western District of Missouri: Case No. 94-43096-13. The debtor converted the proceedings to a case under Chapter 13 of the Bankruptcy Code on February 21, 1995. On May 8, 1995, the Trustee filed a complaint to set aside Fidelity's lien on an automobile owned by the debtor as a preferential transfer. The Honorable Frank W. Koger, Chief Bankruptcy Judge, United States District Court for the Western District of Missouri, sustained the Trustee's position and judgment was entered July 25, 1995 and amended on August 28, 1995. Fidelity

filed its Notice of Appeal with the District Court on July 24, 1995, and filed an Amended Notice of Appeal with the District Court on July 25, 1995. The District Court had jurisdiction to hear Fidelity's appeal from the Bankruptcy Court pursuant to 28 U.S.C. § 158(a). The appeal was from an Order entered in a "core" proceeding referred to the bankruptcy judge under 28 U.S.C. § 157(b)(2) and was made to the district judge in the judicial district in which the bankruptcy judge serves. For these reasons, the appeal was properly before the District Court.

On appeal to the District Court, Honorable Ortrie D. Smith, Judge, United States District Court, Western District of Missouri, Western Division, affirmed the Bankruptcy Court. United States District Court, Western District of Missouri: Case No. 95-0797-CV-W-3. Final judgment was entered in the District Court on February 9, 1996. Fidelity filed its Notice of Appeal to the Eighth Circuit Court of Appeals on February 9, 1996. The appeal to the Eighth Circuit was from a final judgment entered under 28 U.S.C. § 158(a). Accordingly, the Eighth Circuit had jurisdiction to hear the appeal pursuant to 28 U.S.C. § 158(d).

On November 27, 1996, the Eighth Circuit issued its opinion affirming the Bankruptcy Court and the District Court.

C. Statement of Relevant Facts

1. On or about August 17, 1994, Fidelity Financial Services, Inc. ("Fidelity") financed the purchase of a 1994 Ford Probe, VIN #lZDLT20A4R5133799, by Denise R. Beasley ("Beasley"), Debtor. At that time, Beasley executed and delivered a Note and Security Agreement to Fidelity. (Appendix G, pp. 41a-45a).

2. August 17, 1994 was the 229th day of 1994. (Appendix G, pp. 41a-45a).

3. On or about September 7, 1994 (21 days later), Fidelity mailed an Application for Missouri Title and License (a "blue slip") to the Missouri Department of Revenue, together with the requisite fee. (Appendix G, pp. 41a-45a).

4. The "blue slip" (which is the secured party's copy of the Application for Title) was subsequently processed by the Department of Revenue and returned to Fidelity with a "filed date" of September 23, 1994. (Appendix G, pp. 41a-45a).

5. At Fidelity's request, Susan M. Venturella, Senior Counsel for the Missouri Department of Revenue, investigated the delivery date of the Application for Title, and determined that said Application was actually received by the Department of Revenue on September 12, 1994 (26 days after creation of the debt and security interest). (Appendix G, pp. 41a-45a).

6. On November 18, 1994, Beasley filed a Petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Missouri, and Gary D. Barnes was appointed interim Trustee. (Appendix G, pp. 41a-45a).

7. November 18, 1994 was the 322nd day of 1994, 93 days after the transfer by Beasley of the security interest to Fidelity. (Appendix G, pp. 41a-45a).

8. Fidelity is not an insider pursuant to 11 U.S.C. § 547. (Appendix G, pp. 41a-45a).

9. Fidelity filed a claim on December 16, 1994 in the amount of $14,670.15 but did not place a value on the security. (Appendix G, pp. 41a-45a).

10. The parties agree that the value of the vehicle is $14,000.00. (Appendix G, pp. 41a-45a).

11. The vehicle is fully insured and Fidelity Financial is listed as the loss payee. (Appendix G, pp. 41a-45a).

12. At the 341 Meeting of Creditors on December 19, 1994, Gary D. Barnes, Trustee ("Barnes"), announced that he intended to file an adversary action to avoid Fidelity's lien because the Application for Title was received more than 20 days after the loan was made (despite the fact that § 301.600 R.S. Mo. provides that a lien is perfected:

> *. . . by the delivery to the Director of Revenue [of] . . . an Application for Certificate of Ownership containing the name and address of the lienholder and the date of the Security Agreement, and the required Certificate of Ownership fee [and] is* ***perfected as of the time of its creation if the delivery of the aforesaid to the Director of Revenue is completed within 30 cars thereafter, otherwise as of the time of the delivery*** *. . .* [*Emphasis added*].

(Appendix G, pp. 41a-45a).

13. The Trustee also demanded the debtor surrender the vehicle or pay the estate $2,500 and reaffirm the debt to Fidelity or convert to a Chapter 13, meet the best interest of creditors test, agree to refrain from filing a second bankruptcy for 180 days if the present case was dismissed, and pay the Trustee his fees, estimated at $500, over three months. (Appendix G, pp. 41a-45a).

14. Rather than accept any of these options, the Debtor converted these proceedings to a case under Chapter 13 on February 21, 1995, and filed a Plan proposing to avoid Fidelity's lien, to treat Fidelity as an unsecured claimant, and to pay the nonexempt value of the vehicle to her creditors pursuant to 11 U.S.C. § 1305(a)(4). (Appendix G, pp. 41a-45a).

15. On March 30, 1995, Fidelity filed its Objection to Confirmation under § 1325(a)(5) of the Bankruptcy Code asserting that the Plan failed to provide for Fidelity to retain its lien and receive property of a value which is not less than the allowed amount of Fidelity's claim. (Appendix G, pp. 41a-45a).

16. Also on March 30, 1995, the debtor announced at her § 341 meeting that she wanted to have a ruling on whether the lien could be avoided in order to show good faith to the unsecured creditors. She said she understood that should would either pay Fidelity or the unsecured creditors the value of the vehicle. (Appendix G, pp. 41a-45a).

17. Since the avoidance of the lien would benefit the estate the Trustee agreed to let counsel represent him in the effort to determine whether Fidelity had obtained a preference. (Appendix G, pp. 41a-45a).

18. On or about May 8, 1995, Richard V. Fink, Chapter 13 Trustee, filed a Complaint to Set Aside Preference on the grounds that Fidelity did not perfect its lien on or before 20 days after the Debtor received possession of the security, that the lien is therefore a transfer to Fidelity on account of an antecedent debt made while the Debtor was insolvent and enabling Fidelity to receive more than it would have received as an unsecured claimant. (Appendix G, pp. 41a-45a).

19. This is a "core proceeding" within the meaning of 28 U.S.C. § 157(b)(2)(F) over which the Court has jurisdiction of the subject matter. (Appendix G, pp. 41a-45a).

20. On appeal, the District Court affirmed the Bankruptcy Court's decision.

21. On appeal to the Eighth Circuit, the Court of Appeals affirmed the District Court. United States Court of Appeals for the Eighth Circuit, Case No. 96-1430.

REASONS FOR GRANTING THE WRIT

A WRIT OF CERTIORARI SHOULD ISSUE BECAUSE:

A. THE DECISION OF THE EIGHTH CIRCUIT CONFLICTS WITH DECISIONS OF THE TENTH AND ELEVENTH CIRCUITS;

B. THE ISSUE PRESENTED FOR REVIEW IS PURELY A LEGAL ISSUE OF STATUTORY INTERPRETATION ON STIPULATED FACTS;

C. THE ISSUE PRESENTED IS OF SIGNIFICANT IMPORTANCE TO CONSUMERS WHO PURCHASE AUTOMOBILES AND INSTITUTIONS WHICH FINANCE SUCH CONSUMER TRANSACTIONS; AND

D. A UNIFORM INTERPRETATION OF 11 U.S.C. § 547 WITH REGARD TO A BANKRUPTCY TRUSTEE'S POWER TO AVOID PREFERENTIAL TRANSFERS WOULD AID IN THE ORDERLY ADMINISTRATION OF BANKRUPTCY PROCEEDINGS IN OUR BANKRUPTCY COURTS.

Fidelity financed the debtor's purchase of an automobile on August 17, 1994. At that time, debtor executed a promissory note and security agreement in favor of Fidelity. Fidelity mailed the documents to perfect its lien to the Missouri Department of

Revenue on September 7, 1994, or 21 days after the security interest was granted. The Department of Revenue received those documents 26 days after the date the debtor signed the note and security agreement and delivered same to Fidelity. Because the last steps necessary to perfect Fidelity's lien in the debtor's property were taken within 90 days of the date debtor filed her petition in bankruptcy, the Trustee sought to avoid the security interest as a preferential transfer pursuant to 11 U.S.C. § 547(b).

Fidelity contends its security interest in the debtor's automobile comes within one of the statutory exceptions to the trustee's power to avoid preferential transfers. 11 U.S.C. § 547(c)(3) provides that the Trustee may not avoid a transfer that creates a purchase of money security interest in property acquired by the debtor if the security interest is perfected on or before 20 days after the debtor receives possession of the property. The Eighth Circuit ruled that Fidelity could not avail itself of this exception to the Trustee's avoidance power because Fidelity did not take the last steps necessary to perfect its security interest in the debtor's property within 20 days after the date debtor took possession of the automobile.

Fidelity asserts that in reaching the conclusion that it did not perfect its security interest within the 20 day time period set forth in 11 U.S.C. § 547(c)(3)(B), the Eighth Circuit did not properly consider 11 U.S.C. § 547(e)(1)(B) which provides "for the purposes of this section . . . the transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of a transferee." In this case, Fidelity was perfected on April 17, 1994, the date of transfer, due to its compliance with Mo. Rev. Stat. § 301.600.2 which provides in relevant part:

> *A lien on encumbrance on a motor vehicle or trailer is perfected by the delivery to the*

> *director of revenue of the existing certificate of ownership, if any, and application for a certificate of ownership containing the name and address of a lienholder and the date of his security agreement, and the required certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within 30 days thereafter, otherwise as the time of delivery.*

Due to Fidelity's compliance with Mo. Rev. Stat. § 361.600.2, no creditor on a simple contract could acquire a judicial lien superior to Fidelity's after August 17, 1994.

Two Circuit Courts of Appeals have addressed this precise issue and have concluded that security interests in vehicles properly perfected under state vehicle perfection statutes are not subject to attack as preferential transfers even if the physical act of perfection occurs beyond the grace period set forth in § 547(c)(3)(B), since the security interest is deemed perfected under state law the moment that the security interest is created. In *In re Busenlehner*, 918 F.2d 928 (11th Cir. 1990), *cert. denied*, *Moister v. General Motors Acceptance Corp.*, 500 U.S. 949, 111 S. Ct. 2251, 114 L. Ed. 2d 492 (1991), Alfred D. Busenlehner and Faye Elaine Busenlehner (the Busenlehners), Debtors, purchased a car and entered into an Installment Sales Contract and Security Agreement on March 31, 1988 which was subsequently assigned to GMAC. On April 13, 1988, the Georgia Department of Motor Vehicles received a "MY-1 Title Application", thereby perfecting GMAC's security interest under Georgia law (which provides that a security interest in a motor vehicle is perfected as of the time of its creation if the title application is delivered to the Department of Motor Vehicles within 20 days). The Debtors filed a Petition under Chapter 7 of

the Bankruptcy Code on April 26, 1988 and the Chapter 7 Trustee then brought an adversary action against GMAC to set aside GMAC's lien as a preferential transfer (because perfection was not accomplished within 10 days as required by § 547(c)(3). GMAC argued that the security interest was not avoidable because § 547(e)(1)(B) permits the use of State relation-back statutes. Hence, the physical act of perfection did not need to occur within the 10 days grace period so long as, under State law, the security interest was deemed perfected within that period.

The Bankruptcy Court sustained the Trustee's Motion for Summary Judgment, and the District Court reversed. On appeal, the Eleventh Circuit affirmed the District Court, stating:

> *§ 547(c)(3) prevents Trustees from avoiding enabling loans that meet certain conditions. In the case at hand, the only dispute is whether the secured loan complied with the requirement that the loan be "perfected on or before 10 days after the debtor received possession" of the property. 11 U.S.C.A. § 547(c)(3)(B). The Trustee argues that the security interest was perfected on the 13th day following the signing of the security agreement. **GMAC argues that under § 547(c) the physical act of perfecting a lien does not need to occur within the 10 day period as long as, under State law, the security interest is deemed perfected within that period.** [Emphasis added].*
>
> *The issue that confronts us in this case is the meaning of § 547(c)(3)(B)'s phrase "perfected on or before 10 days". The Code*

defines the phrase in § 547(e)(1)(B). § 547(e) governs the timing, for preference purposes, when a transfer is made and when a transfer is perfected. This case presents this panel with a dispute over the latter event. § 547(e)(1)(B) states: "a transfer . . . is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee."

Thus, in order to determine when perfection occurs under § 547, it is necessary to ascertain when the perfected security interest can beat a judicial lien in a priority battle. As this court held in a related context, "this determination must be made by reference to State law" . . . [citation omitted]

Therefore we must turn to Georgia State law to determine when the perfected security interest can beat a judicial lien in a priority battle . . . Georgia law states that a security interest in a motor vehicle is perfected as of the date of its creation if the delivery [to the Department of Motor Vehicles of the proper documental is completed within 20 days . . . In the case at hand, the correct documents were delivered to the Commissioner within the statutory 20 days. Under State law, the security interest was deemed to have been perfected the moment that the security interest was created . . .

Because the Bankruptcy Code adopts state law under § 547(e)(1)(B), the date of

perfection for preference actions in this case is the date of the initial enabling loan. Therefore GMAC perfected the enabling loan within the necessary 10 day period.

This conclusion is supported by the policies underlying preference law. The goal of the drafters of this provision of the 1978 Bankruptcy Reform Act was to bring preference law "more into conformity with commercial practices and the Uniform Commercial law" [citation omitted]

Creditors are encouraged by our legal system to secure their loans. The general message to creditors is that should they follow State Commercial Law their secured loans will be protected in Bankruptcy.

By limiting the effect of State relation-back statutes in Bankruptcy, legitimate commercial practices are penalized. To hold for the Trustee in this case may be beneficial in that it creates a larger estate to pay administrative expenses and unsecured claims . . . The creditor, moreover, lent the money in the expectation that the creditor's compliance with State law was stufficient to protect the loan. Debtors should not be given the ability to surprise and upset established commercial practices by fling for Bankruptcy and avoiding this otherwise acceptable security interest.

In *In re Hesser*, 984 F.2d 345 (10th Cir. 1993), James and Doris Hesser (the Hessers), Debtors, purchased and took possession of a 1990 Toyota on April 16, 1990. The Hessers executed a Retail Installment Sales Contract and Security Agreement which was subsequently assigned to General Motors Acceptance Corporation (GMAC). On the date of purchase, the seller executed and delivered a "Lien Entry Form" to the motor license agent (Oklahoma law provides that perfection of a security interest in a vehicle relates back to the date of purchase if a lien entry form is presented to the Oklahoma Tax Commission or its agent within 15 days of purchase). The lien entry form was actually received by the Oklahoma Tax Commission on May 1, 1990 (the 15th day after purchase). On May 18, 1990, the Hessers filed a Petition under Chapter 7 of the Bankruptcy Code. The Chapter 7 Trustee then filed an action to set aside GMAC's security interest as a preference pursuant to 11 U.S.C. § 547(b) (because the transfer was allegedly "for or on account of an antecedent debt owed by the debtor before such transfer was made since same was perfected more than 10 days after the execution of the security agreement and the creation of the debt occurred prior to, and not contemporaneously with the transfer of the security interest). GMAC countered that the transfer was contemporaneous with the creation of the debt because, under Oklahoma State law, perfection automatically related back to the date of purchase. Further, said transfer was a contemporaneous exchange for new value. The Trustee filed a Motion for Summary Judgment which was granted by the Bankruptcy Court and affirmed by the District Court. On appeal, the Eleventh Circuit reversed and stated:

> *The sole issue in dispute is the appropriate timing and method of the perfection of a security interest provided for in § 547 of the Bankruptcy Code. We agree with the 11th Circuit that the Bankruptcy Code adopts*

> *State law to determine the date of perfection under § 547(e)(1)(B) . . . [citation omitted]*
>
> *§ 547(e)(1)(B) applies to the perfection of a transfer of a fixture or property other than real property and provides "for purposes of this § a transfer . . . is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee . . ."*
>
> ***Thus, in order to determine the date of perfection, it is necessary to determine when the perfected security interest can beat a judicial lien in a priority battle . . . This determination is made by reference to state law . . .***
>
> ***After the date of perfection is determined, the time of the transfer must be ascertained and must fit within the 10-day grace period provided in § 547(e)(2) . . . Thus, § 547(e) provides for a two step process: first, determine the date of perfection according to state law pursuant to § 547(e)(1)(A) or (B), and second, determine the time of transfer pursuant to § 547(e)(2).***
>
> *Because under Oklahoma law, GMAC's security interest was perfected on April 16, April 16 is also the date that GMAC s security interest was perfected for purposes of § 547 because it is the date on which "a creditor on a simple contract cannot acquire a judicial lien that is superior" to the secured*

creditor GMAC. Because the date of the perfection coincides with the date on which the security interest was granted, the transfer of the security interest was not "for or on account of an antecedent debt" 11 U.S.C § 547(b)(2), and also was "perfected on or before 10 cars after the debtor received possession of the property" 11 U.S.C. § 547(c)(3)(B). Therefore, because the Trustee cannot meet all of the elements necessary to avoid the transfer pursuant to § 547(b) and furthermore, GMAC can claim protection under § 547(c)(3). the transfer cannot be avoided be the Trustee. [*Emphasis added*].

The Court in *In re Power*, 133 B.R. 242 (Bkrtcy. N.D. Okla. 1991), addressed the same issue and reached the same result. On March 7, 1991, Judi E. Beaumont (Beaumont), Debtor, purchased and took possession of a 1989 GMC pickup truck, and executed a Retail Installment Contract and Security Agreement (which was assigned to GMAC). GMAC perfected its interest by filing a lien entry form with the Oklahoma Tax Commission on March 22, 1991 (15 days later). On April 10, 1991, Beaumont filed a Chapter 7 Petition. Thereafter, the Chapter 7 Trustee filed a complaint to avoid GMAC's lien as a preferential transfer because the act of perfection did not occur within the 10 day grace period prescribed by 11 U.S.C. § 547(e)(2). GMAC argued that its lien perfection on Day 15 related back to Day 1 under Oklahoma State law and the granting of the security interest was therefore legally contemporaneous with the creation of the debt. Hence, no transfer was made on account of an antecedent debt.

The court granted summary judgment in favor of GMAC citing *In Re Busenlehner*:

[2] The exact issue before this Court was before the 11th Circuit, in In re Busenlehner, 918 F.2d 928, 930 (11th Cir. 1990). In this case, the Trustee brought an adversary proceeding against GMAC to recover a preference GMAC had perfected its security interest in a motor vehicle thirteen days after the purchase and execution of the security agreement, but within the twenty-day grace period allowed by the state statute The state statute provided, as does the Oklahoma Statute, that if perfected within the allotted time, the lien relates back to the day of execution of the security agreement The Court held in favor of GMAC finding perfection related back to the date of the security agreement Therefore, perfection occurred within 10 days of the transfer of the security interest and GMAC's lien is excepted from avoidance under 11 USC 547(c)(3)(B) as not being on account of an antecedent debt The creation of the debt and the transfer of an interest of the debtor in property as collateral for that debt happened contemporaneously.

* * *

The Court points out that in the Hamilton case the applicable state statutes allowed a twenty-day grace period for perfection of the security interest but did not provide perfection to relate back to Day One, if the lien was perfected timely. In the Matter of Hamilton, 892 F.2d 1233, nn. 14-15.

This Court believes the Bankruptcy Code clearly states that the transfer occurs on Day One if the lien is perfected within ten days ***Under Oklahoma law, the lien of GMAC was deemed perfected on Day One even though the physical act of perfection occurred on Day 15. The Bankruptcy Code does not say the physical act of perfection has to occur within ten days; it just states that the lien must be perfected within ten days. Here, that requirement was met. No transfer of the Debtor's interest in property was made on account of an antecedent debt. Execution of the security interest, creation of the debt, and a transfer of Debtor's property happened at the same time and no avoidable preference occurred.***

This argument is buttressed by reference to Bankruptcy Code § 547(e)(1)(B) which states:

> *(B) a transfer of . . . property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.*

In the present case, this means that transfer was complete when a judgment creditor of the debtor could not obtain an interest superior to the interest of GMAC. Under Oklahoma law, GMAC's security interest in the truck was perfected on Day one and no

> *subsequent judgment creditor could obtain a superior interest in the truck.*

The case of *In re Burnett*, 14 B.R. 795 (Bkrtcy. E.D. Tenn. 1981) is also supportive. Raymond Burnett, Jr. (Burnett), Debtor, purchased and took possession of a truck on November 14, 1980. Burnett executed a Note and Security Agreement which was assigned to First Tennessee of Chattanooga (the Bank). On December 4, 1980, the Bank filed an Application for Title. On February 11, 1981, the Debtor filed a Petition under Chapter 7 of the Bankruptcy Code and the Trustee thereafter initiated an adversary action to set aside the Bank's security interest as preferential. The Bank argued that despite its failure to file the Application for Title within 10 days, its security interest was always perfected because it filed within the 20 day grace period allowed under Tennessee State law. The Bankruptcy Court (Ralph H. Kelley, Bankruptcy Judge), while acknowledging that Congress intended for 10 days to be a uniform grace period, held that Congress must have intended perfection under § 547(c)(3) to include perfection as a matter of law by virtue of state relation-back statutes:

> *It may be easiest to compare interpretations. The one that agrees with Congress's intent depends primarily on the tense of the definition. A security interest "is perfected" when a creditor "cannot" acquire a superior judicial lien. This seems to require the court to look at the facts at any moment from that perspective. Suppose that a bank has a purchase money security interest that it has notified to perfect, but the twenty day grace period has not expired. During the grace period and before the bank files, a creditor can possibly acquire a superior judicial lien.*

That depends on whether the bank actually does file within the grace period. If the bank does, then its security interest will have priority because its perfection will relate back to when the security interest attached, before the creditor acquired the judicial lien But from the creditor's perspective it could not know that was going to happen when it acquired its judicial lien.

This interpretation is consistent with Congressional intent. For Article 9 security interests, perfection would begin when the last step necessary for perfection occurred, but perfection would not relate back to an earlier step in the process of perfection.

The best way of looking at the bank's argument is to consider the definition as referring to a period of time. On that theory, the definition means a security interest is perfected during any period of time when a creditor cannot acquire a superior judicial lien. The period of time can begin before the last step necessary for perfection occurs.

The court believes this interpretation is the more reasonable of the two. Though both interpretations are consistent with the wording of the definition, this one is less troublesome than the interpretation that agrees with Congress's intent. That interpretation strains the wording of the definition to conclude that the court must consider the facts from an earlier

perspective, rather than as they turned out.

This interpretation is not objectionable on the basis of the floating lien cases. In those cases the courts held security interests perfected before they were perfected under the UCC. This preference statute was meant to overrule those cases But the problem in this case is not that the definition will allow perfection to occur before perfection under the UCC. Perfection during the grace period, even by relation back, is perfection under the UCC.

Thus, the court agrees with the bank's argument. Since it perfected during the grace period, its security interest was perfected from the time it attached, both under state law and under the definition of perfection in the preference statute. There was no transfer on account of an antecedent debt.

Virtually all states have statutes that require lien notation on a Certificate of Title in order to perfect an interest in motor vehicles. Likewise, § 9-301 of the Uniform Commercial Code (which has been adopted in some form or other by virtually all states) clearly states that the filing provisions of Article 9 do not apply to purchase money security interests in motor vehicles. Thus, it is arguable that Congress did not intend the 20 day relation-back period in § 547(c)(3) to apply to vehicles perfected under special State statutes exclusively governing perfection of interests in vehicles. Although the grace period in § 547(c)(3) for purchase money loans was changed from 10 days to 20 days in the 1994 amendments to the Bankruptcy Code because most

states have adopted 20 day grace periods under their particular version of § 9-301 of the Uniform Commercial Code, no reference was made to State statutes *specifically governing perfection of interests in motor vehicles*, which often include special relation-back periods exclusively for automobile financing.

The applicable vehicle perfection statute in Missouri is Mo. Rev. Stat. § 301.600.2 (1994). This statute has exclusively governed perfection of motor vehicles in Missouri since 1965. Thus, Missouri has a long-standing special statute governing perfection of interests in automobiles which specifically provides for a 30-day relation-back period. Fidelity provided financing and took steps to perfect its security interest in compliance with the aforementioned long-standing statute and in the expectation that the creditor's compliance with State law was sufficient to protect the loan *Busenlehner, supra.* Under Missouri law, Fidelity's lien was deemed perfected on August 17, 1994 even though the physical act of perfection occurred 21 days later, since "perfection during the grace period, even by relation-back, is perfection under the WCC." *Burnett, supra.* August 17, 1994 is also the date that Fidelity's lien was perfected for purposes of § 547 because it is the date on which "a creditor on a simple contract [could not] acquire a judicial lien" superior to Fidelity. Because the date of perfection coincides with the date of creation, the transfer of the security interest was not "for or on account of an antecedent debt" under § 547(b)(2) and was also perfected on or before 20 days after the Debtor received possession of the property under § 547(c)(3)(B). The Chapter 13 Trustee did not meet all of the elements necessary to avoid the transfer under § 547(b) and the transfer is not subject to avoidance. *Hesser, supra.*

Fidelity concedes that there is contrary authority. *See In re Hamilton*, 892 F.2d 1230 (5th Cir. 1990); *In re Holder*, 892 F.2d

29 (4th Cir. 1989); *In the Matter of Tressler*, 771 F.2d 791 (3d Cir. 1983); *In re Loken*, 175 B.R. 56 (Bkrtcy. 9th Cir. 1994); *In re Holloway*, 132 B.R. 771 (Bkrtcy. N.D. Okla. 1991); *In re Scoviac*, 74 B.R 635 (Bkrtcy. N.D. Fla. 1987); *In re Murray*, 27 B.R. 445 (Bkrtcy. N.D. Tenn. 1984); *In re Walker*, 77 F.3d 322 (9th Cir. 1996), February 26, 1996; *In re Walker*, 161 B.R 484 (Bkrtcy. D. Idaho 1993).

However, few of these cases appear to involve interpretation of a long-standing State statute *exclusively* governing perfection of security interests in *automobiles* and *specifically* including a relation-back period for perfection of vehicles. The State statutes at issue in *Hamilton, Loken, Murray, Scoviac, Tressler* and *Holder* apparently did not have a specific relation-back provision under a separate vehicle perfection statute and the lienholder was therefore forced to rely on the grace period provided in § 9-301 of that particular State's version of the *Uniform Commercial Code*. Missouri itself has a 20-day grace period for non-vehicle purchase money loans (Mo. Rev. Stat. § 400.9-301).

CONCLUSION

Fidelity's purchase money lien was properly perfected under the applicable Missouri motor-vehicle perfection statute, and is not subject to avoidance under § 547 of the Bankruptcy Code. The reasoning of the Tenth and Eleventh Circuits in *In re Hesser* and *In re Busenlehner,* should be adopted because they involve similar State statutes with specific relation-back periods for vehicles (separate and apart from the relation-back period provided for in § 9-301 of the Uniform Commercial Code). Moreover, lenders have been relying on the 30-day grace period provided for in perfecting interests in motor vehicles in Missouri since 1965, and Debtors "should not be given the ability to surprise and upset established commercial practices by filing for bankruptcy and avoiding this otherwise acceptable security interest."

The Eighth Circuit decision acknowledges that compliance with Mo. Rev. Stat. § 301.600.2 (1994) results in perfection as of the date of purchase and that Fidelity did, in fact, comply with the requirements of the Mo. Rev. Stat. § 301.600.2 (1994) such as to have its lien deemed perfected on the date of purchase. Again, the fact of the matter is that no creditor on a simple contract could acquire a judicial lien that was superior to Fidelity's interest after August 17, 1994, the date of the purchase. Nevertheless, the Eighth Circuit ruled that the state relation back statute should not apply when determining preferential transfers pursuant to 11 U.S.C. § 547. Fidelity contends the Eighth Circuit's holding in this regard is contrary to the plain language of 547(e)(1)(b) and moreover with the vast body of bankruptcy cases which have determined that state law governs with regard to matters of perfection of security interests.

Resolution of the issue presented will affect thousands of consumer transactions for the purchase of automobiles. The Eighth Circuit has acknowledged "Congress's desire to have a 'uniform rule throughout the county.' " A uniform interpretation of 11 U.S.C. § 547 will be consistent with this desire.

Wherefore, for the foregoing reasons, Fidelity respectfully requests that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED NOVEMBER 27, 1996

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-1430

In re: Denise Renee Beasley,

Debtor,

Richard V. Fink, Trustee,

Appellee,

v.

Fidelity Financial Service, Inc.,

Appellant.

Appeal from the United States District Court for the Western District of Missouri.

[UNPUBLISHED]

Submitted: October 30, 1996

Filed: November 27, 1996

Before BEAM, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

Appendix A

PER CURIAM.

Fidelity Financial Services, Inc. ("Fidelity") appeals the district court's affirmance of the bankruptcy court's[1] order setting aside Fidelity's lien on the debtor's car as a voidable preference. The bankruptcy court's ruling depended on its conclusion that state relation-back statutes are inapplicable to preference-avoidance analysis under 11 U.S.C. § 547(c)(3)(B). This is an issue of first impression in this circuit. In agreement with the position of the Ninth Circuit, we now hold that state relation-back periods do not apply to section 547 analysis.

Section 547(b) of the Bankruptcy Code ("Code") allows a trustee in bankruptcy to avoid certain prepetition payments end transfers of a debtors property as "preferential transfers." Not all preferential transactions are voidable under section 547(b), however. As relevant here, section 547(c)(3)(A) provides an exception for interests securing new value. Section 547(c)(3)(B) allows a creditor a twenty-day grace period in which to perfect an interest securing new value and thereby protect the interest from the trustees preference-avoidance powers.

Under section 547(e)(1)(B), "a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." Under Missouri law, if an interest in a vehicle is perfected within thirty days of the purchase, the perfection will be considered effective as of the date of purchase.

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1. The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri, affirming the decision of the Honorable Frank W. Koger, Chief Judge, United States Bankruptcy Court for the Western District of Missouri.

Appendix A

Mo. Rev. Stat. § 301.600.2 (1994). According to the parties' stipulation, Fidelity fulfilled state requirements for perfecting its interest in the car twenty-one days after debtor purchased it. The issue in this case is whether Missourians thirty-day relation-back statute applies in determining whether Fidelity perfected its interest within the grace period provided by the Code.

The Ninth Circuit has concluded that state-law relation-back periods are inapplicable to preference-avoidance analysis. *In re Loken*, 175 B.R. 56, 61 (B.A.P. 9th Cir. 1994), *cited with approval in Fitzgerald v. First Sec. Bank of Idaho (In re Walker)*, 77 F.3d 322, 322 (9th Cir. 1996). The court reasoned that the Code's unambiguous definition of perfection required it to determine at what point a judicial lienholder is barred from obtaining rights superior to those of a transferee. 175 B.R. at 61-62. It held that such a bar arises "when the transferee takes the last step required by state law to perfect its security interest," and until then, "it is not possible to say that other creditors 'cannot' obtain superior rights." *Id.* at 62. The court concluded that determining perfection without reference to state grace periods is consistent with Congress's desire to have "a uniform rule throughout the country." *Id.* at 62-63.

We find this reasoning persuasive. Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION FILED JANUARY 22, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 95-0797-CV-W-3

IN RE:

DENISE RENEE BEASLEY,

Debtor.

FIDELITY FINANCIAL SERVICES INC.

Appellant,

v.

RICHARD V. FINK, Trustee,

Appellee.

OPINION AFFIRMING BANKRUPTCY COURT'S RULING

Pending is an appeal of the Bankruptcy Court's decision setting aside Fidelity Financial Services' ("Fidelity's") lien in an automobile purchased by the Debtor. For the reasons set forth below, the Bankruptcy Court's decision is AFFIRMED.

Appendix B

I. BACKGROUND

The facts have been stipulated to by the parties. The Debtor purchased and obtained possession of a 1994 Ford Probe on August 17, 1994. At the same time, she delivered a promissory note to Fidelity in the amount of $14.090.80 with an interest rate of 20.85%. Debtor also entered into a security agreement with Fidelity. On September 7, 1994, or twenty-one days later Fidelity mailed an application for a Missouri Title to the Missouri Department of Revenue. The application was received by the Department of Revenue on September 12.

Debtor filed her petition for relief under Chapter 7 of the Bankruptcy Code on November 18, 1994. Following a series of events that are not relevant to this appeal, the case was converted to Chapter 13. The Trustee objected to Fidelity's assertion of a security interest in the automobile, and Fidelity appeals the Bankruptcy Court's decision sustaining that objection.

II. DISCUSSION

As the purported perfection of Fidelity's security interest occurred within ninety days prior to the filing of the petition, it must be set aside as a preference, *see* 11 U.S.C. § 547(b), unless the purchase money security exception contained in 11 U.S.C. § 547(c)(3) applies. This section provides that a transfer may not be avoided as a preference if the transfer creates a security interest in property "that is perfected on or before 20 days after the debtor receives possession of such property." *Id.* § 547(c)(3)(B).[1]

1. The other requirements for satisfying the purchase money security interest exception are not at issue on this case, and therefore will not be discussed.

Appendix B

At first glance, it appears clear that Fidelity's security interest was perfected beyond this grace period because the application was not mailed until twenty-one days after the Debtor obtained possession of the car. However, under Missouri law, a security interest in an automobile "is perfected as of the time of its creation if the delivery of the [application] to the director of revenue is completed within thirty days" after the security interest is created Mo. Rev. Stat. § 301.600.2. Fidelity contends that this statute, and not § 547(c)(3). governs, and it therefore entitled should be treated as a lien creditor.

The Bankruptcy Court's legal determinations are to be reviewed *de novo* Having conducted an independent review of the matter, I conclude the Bankruptcy Court should be affirmed. The Bankruptcy Code states that a lien is perfected "when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." 11 U.S.C § 547(e)(1)(B). Obviously, state law will establish the acts necessary to actually perfect a lien. It is these acts that form the focus for an inquiry under the purchase money security interest exception; if the last act necessary to perfect a security interest is taken within twenty days of the filing of the case, the exception provided by § 547(c)(3) applies. If the last act is taken beyond the twenty day period (as was the case here), then the exception does not apply and the perfection of the lien is a preference. *See In re Hamilton,* 892 F.2d 1230,1233-34 (5th Cir. 1990); *In re Loken*, 175 B.R. 56, 61-63 (Bankr. 9th Cir. 1994). *In re Holloway,* 132 B.R. 771, 773-74 (Bankr. N.D. Okla. 1991); *In re Holder,* 94 B.R. 395, 398 (Bankr. M.D.N.C. 1988).

The fact that Missouri law allows a longer period of time to perfect a lien on a motor vehicle is irrelevant to this inquiry. The provision allowing a lien perfected within thirty days of

Appendix B

transfer to be treated as "perfected on the day of its creation" defines the priority of a valid lien. However, this provision does not affect the relevant inquiry. Section 547(c)(3) applies if the security interest is actually perfected within twenty days, not if it is "deemed" perfected within twenty days.

Fidelity stresses the importance of honoring commercial expectations, which are based on compliance with state law. *E.g., In re Hesser,* 984 F.2d 345, 349 (10th Cir. 1993); *In re Busenlehner,* 918 F.2d 928, 931 (11th Cir.), *cert. denied,* 500 U.S. 949 (1991). Fidelity also stresses the historical state interest in special statutes governing security interests in motor vehicles. Of course, the very nature of bankruptcy upsets commercial expectations and commercial endeavors can be and often are guided by the Bankruptcy Code's provisions just as much as they are guided by relevant state law. Moreover, the concerns raised by Fidelity are policy considerations that are best addressed by Congress not the courts. Finally, despite Fidelity's suggestion, nothing in § 547(c)(3) suggests "that Congress did not intend the 20 day relation-back period . . . to apply to vehicles perfected under special State statutes governing perfection of interests in vehicles" *See Patterson v. Shumate,* 112 S. Ct. 2242, 2247 (1992) (clear language of Bankruptcy Code provision requires that it be enforced "according to its terms"). The Court is mindful of many instances in which Congress specifically directed that the Bankruptcy Code defer to or adopt provisions of state law. *E.g.,* 11 U.S.C. § 109(c)(2) (declaring when entities may be debtors under Chapter Nine of the Bankruptcy Code); *id.* § 522(b)(1) (permitting states to prohibit use of Bankruptcy Code's list of exemptions); *id.* § 522(f)(3) (referencing "State law that is applicable to the debtor" to limit avoidance of certain liens); *id.* § 547(c)(7) (declaring payments made under certain payments "made in

accordance with State or territorial law by a governmental unit" to not be preferences under certain circumstances), *id.* § 903 (preserving a State's power to control entities filing petition under Chapter Nine). In addition to these specific references to state law, the Bankruptcy Code is replete with references to "other applicable law," which serves to incorporate state law into those provisions. Thus, had Congress wanted to accord special status to state statutes governing security interests in motor vehicles, it knew how to accomplish this task. Congress' failure to so provide strongly suggests that the plain, straightforward interpretation of § 547(c)(3) adopted herein is proper. *See Loken*, 175 B.R. at 62-63.

III. CONCLUSION

For the reasons set forth above, the Bankruptcy Court's decision in this case is AFFIRMED.

IT IS SO ORDERED.

s/ Ortrie D. Smith

ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: 1/22/96

APPENDIX C — AMENDED MEMORANDUM OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI FILED AUGUST 28, 1995

IN THE UNITED STATES BANKRUPTCY
WESTERN DISTRICT OF MISSOURI

Case No. 94-43096-2-13

Adv. No. 95-4081

IN RE:

DENISE R. BEASLEY,

Debtor.

RICHARD V. FINK, Chapter 13 Trustee,

Plaintiff

vs.

FIDELITY FINANCIAL SERVICES, INC.,

Defendant

AMENDED MEMORANDUM OPINION

Debtor filed for relief under 11 U.S.C. Chapter 7 on November 18, 1994. At the § 341 meeting and from documentation and claims filed, the Chapter 7 Trustee determined that there was a problem with the alleged secured position of Fidelity Financial Services. For that reason the

Trustee demanded that the debtor deliver possession of a 1994 Ford Probe which debtor had purchased and which debtor and Fidelity Financial Services thought was secured by a perfected lien in favor of said financial institution based on the monies advanced to debtor by said institution. Faced with the alternative of either turning the car over and letting the Trustee fight with Fidelity Financial Services or paying off the car in some fashion, debtor chose to convert to a Chapter 13. Debtor was then in effect a debtor in possession and the Chapter 13 Trustee engaged debtor's counsel to be his counsel to seek determination of the validity of Fidelity Financial's lien.

In this proceeding therefore, it would seem that debtor is basically somewhat of a stake holder and nothing more. If the Chapter 13 Trustee is successful and the lien is avoided, debtor by virtue of 11 U.S.C. §1325(a) (4) has to pay the value of the vehicle (less exemption) into the Chapter 13 plan for the unsecured creditors. If, on the other hand, the lien of Fidelity Financial is determined to be impregnable, debtor has to pay Fidelity Financial the balance due on the lien, at least to the value of the collateral.

With this background then, the Court will recite the facts which are basically stipulated to by the parties. Debtor purchased the 1994 Probe on August 17, 1994, and delivered at that time to Fidelity Financial Services, Inc. her promissory note for $14,909.80 with interest at the rate of 20.85%. Debtor also delivered to Fidelity Financial a security agreement which has been introduced into evidence.

On September 7, 1994, or 21 days later, Fidelity mailed an application for Missouri Title and License to the Missouri Department of Revenue together with the requisite fee for the

imposition of the lien on the face of the title. A copy of that application has also been submitted into evidence.

The so called "blue slip" which is secured party's copy of the application was processed by the Department of Revenue and returned to Fidelity with a file date of September 23, 1994. However, a search of the records determined, and the parties have agreed, that the Department of Revenue received Fidelity's application for title and imposition of lien on September 12, 1994. Putting all the dates together what is obvious already to informed readers is that Fidelity filed the necessary paper work and same was received by the Department of Revenue 26 days after the date debtor signed the note and security agreement and delivered same to Fidelity. The date of the filing of the petition was 93 days after August 17, 1994, and therefore outside the magic preference period because, of course, there is no claim that Fidelity is an insider. Nevertheless, the date that Fidelity mailed the application to the Department of Revenue that would procure for it a secured position, the date that same was received by the Department of Revenue, the date that the "blue slip" was returned to Fidelity, were all within the magic 90 days preference period. Informed readers will also note, of course, that as of October 22 or October 24, 1994, whichever date one prefers, Congress had decreed that 11 U.S.C. § 547(c)(3) would allow a snap back of 20 days from the date of purchase to the date of perfection under the so called purchase money security interest exception to preference law. The State of Missouri, on the other hand, allows a secured party 30 days to perfect a purchase money security interest and provides that if a secured party does transmit the title application and lien imposition paper work to the Department of Revenue within 30 days of the purchase, the lien is valid as a purchase money security interest against all parties obtaining any interest within the time period between purchase and receipt of application. *See* Mo. Rev. Stat. § 301.600.2 (1994), which provides in relevant part:

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> A lien or encumbrance on a motor vehicle or trailer is perfected by the delivery to the director of revenue of the existing certificate of ownership, if any, an application for a certificate of ownership containing the name and address of the lienholder and the date of his security agreement, and the required certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within thirty days thereafter, otherwise as of the time of the delivery.

Thus, we find the problem. Is it the bankruptcy law of 20 days that controls, or is it the state law of 30 days that controls?

There is a split in authority among the courts that have considered this exact issue. In *In re Hamilton*, 892 F.2d 1230, 1234-35 (5th Cir. 1990), and in *In re Loken*, 175 B.R. 56, 61 (Bankr. 9th Cir. 1994), the Fifth Circuit Court of Appeals and the Ninth Circuit Bankruptcy Appellate Panel concluded that state law grace, or relationship-back, periods are inapplicable for purposes of determining whether a transfer is preferential under section 547. *See also In re Walker*, 161 B.R. 484, 501 (Bankr. D. Idaho 1993), *aff'd*, 178 B.R. 497 (D. Idaho 1994); *In re Holloway*, 132 B.R. 771, 773 (Bankr. N.D. Okla. 1991); *In re Holder*, 94 B.R. 395, 398 (Bankr. M.D.N.C. 1988), *aff'd*, 94 B.R. 394 (M.D.N.C. 1988), *aff'd*, 892 F.2d 29 (4th Cir. 1989) (issue of applicability of state law relation-back period not appealed to the circuit court); *In re Scoviac*, 74 B.R. 635, 637-38 (Bankr. N.D. Fla. 1987); *In re Murray*, 27 B.R. 445, 451 (Bankr. M.D. Tenn 1984).

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On the other hand, in *In re Hesser*, 984 F.2d 345, 348-49 (10th Cir. 1993), and in *In re Busenlehner*, 918 F.2d 928, 930-31 (11th Cir. 1990), *cert. denied, Moister v. General Motors Acceptance Corp.* 500 U.S. 949, 111 S.Ct. 2251, 114 L. Ed. 2d 492 (1991), the Tenth Circuit Court of Appeals and Eleventh Circuit Court of Appeals concluded that state law relation-back periods are applicable under a section 547 analysis. *See also In re Power*, 133 B.R. 242, 244 (Bankr. N.D. Okla. 1991); *In re Burnette*, 14 B.R. 795, 801 (Bankr. E.D. Tenn. 1981).

This Court is persuaded that the reasoning of the appellate courts in *Hamilton* and *Loken* and other courts which have determined that state law relation-back periods are inapplicable when deciding whether a preferential transfer has occurred is correct. The court in *Loken* discussed the split in authority and opined:

> Looking at the plain language of Section 547(e)(1), taken as a whole, we find that an ambiguity does not exist. The term "perfected" must be viewed in the context of the rest of the section and with regard for the usual usage of that term. Section 547(e)(1) states that a transfer is perfected when a creditor "cannot" acquire a superior interest. This Section directs courts to determine when a judicial lienholder is not able to obtain a position superior to that of the transferee in question. *See In re Lane*, 980 F.2d 601, 625 (9th Cir. 1992) (applying Section 547(e)(1)(A) — the definition of transfer is "ambiguous;" a transfer is perfected when a subsequent purchaser

cannot acquire a superior interest.) If a judicial lienholder could still obtain superior rights, then the transfer has not been perfected such that the lien holder "cannot" obtain superior rights. Essentially, under Section 547(e)(1), the court must determine the moment in time when a judicial lien creditor is barred from obtaining superior rights. This is a natural reading of the complete Code Section. The courts that have reached a different conclusion have taken the word "perfected" out of context of the remaining words of the statute. We hold that a creditor on a simple contract is barred from acquiring a judicial lien superior to the interest of the transferee when the transferee takes the last step required by state law to perfect its security interest. Until that last step is taken, other creditors could potentially obtain superior rights. Until this last step, it is not possible to say that other creditors "cannot" obtain superior rights.

This interpretation, that the term "perfected" refers to that single date, or moment in time, when the state perfection statute is satisfied, is also consistent with the general usage of the term. *See In re Holloway, supra,* 132 B.R. at 774 ("[I]n the real world perfection is actually accomplished on a particular date by doing a particular act."). A perfect example is the Oregon statute at issue here. The Oregon statute requires that

an application for notation of the interest on the certificate of title be sent to the DMV. The application must be accompanied by certain documentation. The application is marked when it is received by the DMV. The final act required by the Oregon statute is the submission of a completed application and supporting documentation. If everything is in order, "the security interest is *perfected* as of the date marked by the [DMV] on the application." O.R.S. § 803.097(3) (emphasis added). The last act required by Oregon law is the submission of a completed application and supporting documentation to the DMV. Once it is confirmed that this has been done properly, Oregon treats this last required act as the moment the security interest is perfected. This is simply how the term perfected is used in common usage.

Since this issue has produced such divergent views we also will look at the history of this Code section and the legislative intent behind it. The first thing we note is that Congress intended to harmonize the preference statute with the Uniform Commercial Code.

> [T]he adoption of the Uniform Commercial Code radically altered the terminology of secured transactions, and the courts have applied the new terminology to the

> preference sections, which uses certain of the same words as the uniform Commercial Code but in different senses and with different meanings. It is time to bring the two statutes into harmony, and H.R. 8200 does that by adopting the more modern terminology of the Uniform Commercial Code, and providing for specific treatment of transfers by the Code.

H. Rep. No. 595, 95th Cong., 1st Sess. 179 (footnotes deleted). This statement is consistent with our holding that section 547(e)(1) must be read in accordance with general commercial usage.

The Bankruptcy Act ("Act") set a twenty-one day time limit for perfection of transfers. Under Section 60(a)(7) of the Act, the time period would be shorter is state law provided for less time to perfect. However, while state law might provide for less time, Section 60(a)(7) clearly prohibited the use of a state statute to expand the twenty-one days maximum time limit. Congress's reason for changing the timing of Section 60(a)(7) to the ten day time period of Code Section 547(e)(2) is clear. Congress made the change to create a uniform rule throughout the country and it did not intend for state grace periods to be relevant under Section 547. *In*

re Burnette, supra, 14 B.R. at 801. Congress set the grace period at ten days to correspond with the grace period provided under the Uniform Commercial Code. *See In re Walker, supra,* 161 B.R. at 495 (quoting White and Summers, *Uniform Commercial Code* § 25-7, 447-48 (3d ed. 1988)). *See also Burnette, supra,* 14 B.R. at 800. Congress could have provided that each state's own version of Uniform Commercial Code Section 9-310(2) would be applicable. Then states, such as Oregon, could have adopted changes as they saw fit. However, Congress did not do this. Instead, it created one uniform grace period of ten days.

We also take note of Congress's enactment of the Bankruptcy Reform Act of 1994, which was signed into law on October 22, 1994. The Reform Act now allows a creditor twenty days to perfect its purchase money security interest while still qualifying for the enabling loan exception found in Section 547(c)(3). By this change, Congress acknowledged that states were enacting grace periods greater then ten days for such security interests. Congress could have deferred completely to the states by incorporating each state's own timing into the Code. Instead, it chose to continue having the Code itself dictate the applicable grace period. Furthermore, Congress did not amend Section 547(e)(1), which provides the definition for "perfection" as used in Section 547.

Even under the Reform Act then, if a creditor perfects its interest more than ten days after the transfer is effective between the parties, the transfer will be deemed made on the date of perfection, and a preference may therefore exist. If it is perfected within ten days, the transfer is deemed made as of the day it became effective between the parties. Under such circumstances, there will have been no transfer on account of an antecedent debt, and hence, no preference. The only difference under the new law is that lienholders asserting purchase money security interests, who perfect their interest within twenty days of the debtor taking possession of the property in question, may now be able to interpose Section 547(c)(3) as a defense to a preference action. For all purposes of Section 547 though, be it to determine if there was a transfer on account of an antecedent debt or if the enabling loan exception applies, perfection is still determined pursuant to Section 547(e), and is still determined without any reference to state grace periods.

The Panel now applies this law to the facts at hand. The parties agree that Romania's application for a notation of the security interest on the certificate of title was marked October 31, 1991. Clearly then, since there is no other mark on it, the application was received by the DMV on that date, it

contained all the required information and it was accompanied by all necessary documentation. The security interest was perfected on October 31,1991. *See* O.R.S. 803.097(3). On that date, Romania cut off any possibility that a judicial lien creditor could obtain superior rights in the collateral. The relation back effect of O.R.S. § 79.3010(2) is inapplicable.

. . . .

The plain language of section 547(e)(2) provides that a secured creditor will have a ten day grace period for perfecting its security interest. Pursuant to Section 547(e)(1), courts must look to state law to determine the moment in time in which the last step is taken to perfect a security interest. Varying grace periods provided for under state law are irrelevant. If the last necessary act was done within the ten day period of Section 547(e)(2)(A), the transfer will have been made when it became effective between the parties. If it is made after the ten day period, it will have been made when perfected under Section 547(e)(2)(B).

The security interest was effective between Loken and Romania on October 19, 1991. The DMV stamped Romania's application as received on October 31, 1991. The security interest was perfected on that date. This was

> beyond the ten day grace period allowed. Therefore, under 547(e)(2)(B), the transfer of the security interest is treated as made on October 31, 1991, and not October 19, 1991. Consequently, the transfer was made on account of an an antecedent debt under Section 547(b)(2) and the essential element of the preference claim was met.

Loken, 175 B.R. at 61-64.

The recent amendment to section 547(c)(3)(B), which extended the time period in which a lender may perfect its security interest from 10 to 20 days after the debtor receives possession of the property, is further support for the Court's conclusion that state law relation-back periods do not apply. As astutely noted by the bankruptcy court in *Walker*, 161 B.R. at 499, n.18:

> Interestingly, Senate Bill No. 540, a comprehensive set of amendments to the Bankruptcy Code is currently under consideration in Congress. One such change proposed by the bill would be to extend the Section 547(c)(3) grace period to 20 days from the present 10 days because most states have now adopted longer periods for perfection of purchase money security interests. If Defendant's position is correct, and state relation back statutes are already operative under the statute, is is curious that some in Congress feel the need for an amendment to the Code. S. Rep. No. 103-168, 103d Cong. (1993).

See also H.R. Rep. 103-834, 103d Cong., 2d Sess. 20 (Oct. 4, 1994); 140 Cong. Rec. H10767 (Oct. 4, 1994) *reprinted in* Norton Bankruptcy Code Pamphlet p. 596 (1994-95 ed.) (The amendment to section 547(c)(3)(B) "conforms bankruptcy law practices to most States' practice by granting purchase-money security lenders a 20-day period in which to perfect their security interest.").[1]

Here, there is no dispute that Beasley received possession of the 1994 Ford Probe on August 17, 1994. Pursuant to Missouri law, the security interest was perfected at the earliest on September 7, 1994, or 21 days later, when Fidelity Financial mailed an application for Missouri Title and license noting the lien together with the requisite fee to the Missouri Department of revenue. *See In re Schalk*, 592 F.2d 993, 996-97 (8th Cir. 1979) (applying Missouri law) (The security interest is perfected at the earliest when the lender sends an application for a certificate of ownership noting the lien with the required fee to the Missouri Department of Revenue.); Mo. Rev. Stat. § 301.600.2 (1994). The 30-day relation-back period prescribed in Mo. Rev. Stat. § 301.600.2 is inapplicable. Fidelity Financial perfected its lien beyond the 20-day relation-back period provided in section 547(c)(3)(B). Fidelity Financial's security interest in the 1994 Ford Probe is deemed avoided pursuant to section 547(b). The Court will set aside Fidelity Financial's lien as a voidable preference.

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1. The Court has read Judge Federman's well written opinion in *In re Chambers*, 125 B.R. 788 (Bankr. W.D. Mo. 1991). In that case, the lender never sent the application for Missouri title or the filing fee to the Missouri Department of Revenue. The lender was never shown as a lienholder on the title of the vehicle. When acknowledging that the lien was not perfected, Judge Federman noted that the lender failed to perfect the lien in accordance with the 30-day period prescribed in Mo. Rev. Stat. § 301.600, however, Judge Federman was not required to and did not address the issue presently before this Court.

Appendix C

CONCLUSION

Based on the above discussion, the Chapter 13 Trustee's request for relief in his complaint is GRANTED. Fidelity Financial services's lien is set aside as a voidable preference.

The foregoing Memorandum Opinion constitutes Findings of Fact and Conclusions of Law as required by Fed. R. Bankr. P. 7052.

So ORDERED this 28 day of August, 1995.

s/ Frank W. Koger
CHIEF BANKRUPTCY JUDGE

Copy of the above mailed to:

Maureen Scully, Esq.
UAW Legal Services
One Victory Dr., Suite 201
Liberty, MO 64068
ATTORNEY FOR DEBTOR(S)

Michael P. Gaughan, Esq.
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Richard Fink, Trustee
818 Grand, Suite 700
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APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI FILED JULY 14, 1995

IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MISSOURI

Case No. 94-43096-2-13

Adv. No. 95-4081

IN RE:

DENISE R. BEASLEY,

Debtor.

RICHARD V. FINK, Chapter 13 Trustee,

Plaintiff,

vs.

FIDELITY FINANCIAL SERVICES, INC.,

Defendant

MEMORANDUM OPINION

Debtor filed for relief under 11 U.S.C. Chapter 7 on November 18, 1994. At the § 341 meeting and from documentation and claims filed, the Chapter 7 Trustee determined that there was a problem with the alleged secured position of Fidelity Financial Services. For that reason the Trustee demanded that the debtor deliver possession of a 1994

Ford Probe which debtor had purchased and which debtor and Fidelity Financial Services thought was secured by a perfected lien in favor of said financial institution based on the monies advanced to debtor by said institution. Faced with the alternative of either turning the car over and letting the Trustee fight with Fidelity Financial Services or paying off the car in some fashion, debtor chose to convert to a Chapter 13. Debtor was then in effect a debtor in possession and the Chapter 13 Trustee engaged debtor's counsel to be his counsel to seek determination of the validity of Fidelity Financial's lien.

In this proceeding therefore, it would seem that debtor is basically somewhat of a stake holder and nothing more. If the Chapter 13 Trustee is successful and the lien is avoided, debtor by virtue of 11 U.S.C. §1325(b)(4) has to pay the value of the vehicle (less exemption) into the Chapter 13 plan for the unsecured creditors. If, on the other hand, the lien of Fidelity Financial is determined to be impregable, debtor has to pay Fidelity Financial the balance due on the lien, at least to the value of the collateral.

With this background then, the Court will recite the facts which are basically stipulated to by the parties, Debtor purchased the 1994 Probe on August 17, 1994, and delivered at that time to Fidelity Financial Services, Inc. her promissory note for $14,090.80 with interest at the rate of 20.85%. Debtor also delivered to Fidelity Financial a security agreement which has been introduced into evidence.

On September 7, 1994, or 21 days later, Fidelity mailed an application for Missouri Title and License to the Missouri Department of Revenue together with the requisite fee for the imposition of the lien on the face of the title. A copy of that application has also been submitted into evidence.

The so called "blue slip" which is the secured party's copy of the application was processed by the Department of Revenue and returned to Fidelity with a file date of September 23, 1994. However, a search of the records determined, and the parties have agreed, that the Department of Revenue received Fidelity's application for title and imposition of lien on September 12, 1994. Putting all the dates together what in obvious already to informed readers is that Fidelity filed the necessary paper work and same was received by the Department of Revenue 26 days after the date debtor signed the note and security agreement and delivered same to Fidelity. The date of the filing of the petition was 93 days after August 17, 1994, and therefore outside the magic preference period because, of course, there is no claim that Fidelity is an insider. Nevertheless, the date that Fidelity mailed the application to the Department of Revenue that would procure for it a secured position, the date that same was received by the Department of Revenue, the date that the "blue slip" was returned to Fidelity, were all within the magic 90 day preference period. Informed readers will also note, of course, that as of October 22 or October 24, 1994, whichever date one prefers, Congress had decreed that 11 U.S.C. § 547(c)(3) would allow a snap back of 20 days from the date of purchase to the date of perfection under the so called purchase money security interest exception to preference law. The State of Missouri, on the other hand, allows a secured party 30 days to perfect a purchase money security interest and provides that if a secured party does transmit the title application and lien imposition paper work to the Department of Revenue within 30 days of the purchase, the lien is valid as a purchase money security interest against all parties obtaining any interest within the time period between purchase and receipt of application. *See* Mo. Rev. Stat. § 301.600.2 (1994), which provides in relevant part:

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> A lien or encumbrance on a motor vehicle or trailer is perfected by the delivery to the director of revenue of the existing certificate of ownership, if any, an application for a certificate of ownership containing the name and address of the lienholder and the date of his security agreement, and the required certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within thirty days thereafter, otherwise as of the time of the delivery.

Thus, we find the problem. Is it the bankruptcy law of 20 days that controls, or is it the state law of 30 days that controls?

There is a split in authority among the courts that have considered this exact issue. In *In re Hamilton*, 892 F.2d 1230, 1234-35 (5th Cir. 1990), and in *In re Loken*, 175 B.R. 56, 61 (Bankr. 9th Cir. 1994), the Fifth Circuit Court of Appeals and the Ninth Circuit Bankruptcy Appellate Panel concluded that state law grace, or relation-back, periods are inapplicable for purposes of determining whether a transfer is preferential under section 547. *See also In re Walker*, 161 B.R. 484, 501 (Bankr. D. Idaho 1993), *aff'd*, 178 B.R. 497 (D. Idaho 1994); *In re Holloway*, 132 B.R. 771, 773 (Bankr. N.D. Okla. 1991); *In re Holder*, 94 B.R. 395, 398 (Bankr. M.D.N.C. 1988), *aff'd*, 94 B.R. 394 (M.D.N.C. 1988), *aff'd*, 892 F.2d 29 (4th Cir. 1989) (issue of applicability of state law relation-back period not appealed to the circuit court); *In re Soviac*, 74 B.R. 635, 637-38 (Bankr. N.D. Fla. 1987); *In re Murray*, 27 B.R. 445, 451 (Bankr. M.D. Tenn. 1984).

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On the other hand, in *In re Hesser*, 984 F.2d 345, 348-49 (10th Cir. 1993), and in *In re Busenlehner*, 918 F.2d 928, 930-31 11th Cir. 1990), *cert. denied, Moister v. General Motors Acceptance Corp.*, 500 U.S. 949, 111 S. Ct. 2251, 114 L.Ed.2d 492 (1991), the Tenth Circuit Court of Appeals and Eleventh Circuit Court of Appeals concluded that state law relation-back periods are applicable under section 547 analysis. *See also In re Power*, 133 B.R. 242, 244 (Bankr. N.D. Okla. 1991); *In re Burnette*, 14 B.R. 795, 801 (Bankr. E.D. Tenn. 1981).

This Court is persuaded that the reasoning of the appellate courts in *Hamilton* and *Loken* and other courts which have determined that state law relation-back periods are inapplicable when deciding whether a preferential transfer has occurred is correct. The court in *Loken* discussed the split in authority and opined:

> Looking at the plain language of Section 547(e)(1), taken as a whole, we find that an ambiguity does not exist. The term "perfected" must be viewed in the context of the rest of the section and with regard for the usual usage of that term. Section 547(e)(1) states that a transfer is perfected when a creditor "cannot" acquire a superior interest. This Section directs courts to determine when a judicial lienholder is not able to obtain a position superior to that of the transferee in question. *See In re Lane*, 980 F.2d 601, 625 (9th Cir. 1992) (applying Section 547(e)(1)(A) — the definition of transfer is "unambiguous;" a transfer is perfected when subsequent purchaser cannot acquire superior

interest.) If a judicial lienholder could still obtain superior rights, then the transfer has not been perfected such that the lien holder "cannot" obtain superior rights. Essentially, under Section 547(e)(1), the court must determine the moment in time when a judicial lien creditor is barred from obtaining superior rights. This is a natural reading of the complete Code Section. The courts that have reached a different conclusion have taken the word "perfected" out of the context of the remaining words of the statute. We hold that a creditor on a simple contract is barred from acquiring a judicial lien superior to the interest of the transferee when the transferee takes the last step required by state law to perfect its security interest. Until that last step is taken, other creditors could potentially obtain superior rights. Until this last step, it is not possible to say that other creditors "cannot" obtain superior rights.

This interpretation, that the term "perfected" refers to that single date, or moment in time, when the state perfection statute is satisfied, is also consistent with the general usage of the term. *See In re Holloway, supra,* 132 B.R. at 774 ("[I]n the real world perfection is actually accomplished on a particular date by doing a particular act."). A perfect example in the Oregon statute at issue here. The Oregon statute requires that an application for notation of the interest on the

certificate of title be sent to the DMV. The application must be accompanied by certain documentation. The application is marked when it is received by the DMV. The final act required by the Oregon statute is the submission of a completed application and supporting documentation. If everything is in order, "the security interest is *perfected* as of the date marked by the [DMV] on the application." O.R.S. § 803.097(3) (emphasis added). The last act required by Oregon law is the submission of a completed application and supporting documentation to the DMV. Once it is confirmed that this has been done properly, Oregon treats this last required act as the moment the security interest is perfected. This is simply how the term perfected is used in common usage.

Since this issue has produced such divergent views we also will look at the history of this Code section and the legislative intent behind it. The first thing we note is that Congress intended to harmonize the preference statute with the Uniform Commercial Code.

> [T]he adoption of the Uniform Commercial Code radically altered the terminology of secured transactions, and the courts have applied the new terminology to the preference sections, which uses certain of the

> same words as the Uniform Commercial Code but in different senses and with different meanings. It is time to bring the two statutes into harmony, and H.R. 8200 does that by adopting the more modern terminology of the Uniform Commercial Code, and providing for specific treatment of transfers by the Code.

H. Rep. No. 595, 95th Cong., 1st Sess. 179 (footnotes deleted). This statement is consistent with our holding that Section 547(e)(1) must be read in accordance with general commercial usage.

The Bankruptcy Act ("Act") set a twenty-one day time limit for perfection of transfers. Under Section 60(a)(7) of the Act, the time period would be shorter if state law provided for less time to perfect. However, while state law might provide for less time, Section 60(a)(7) clearly prohibited the use of a state statute to expand the twenty-one days maximum time limit. Congress's reason for changing the timing of Section 60(a)(7) to the ten day time period of Code Section 547(e)(2) is clear. Congress made the change to create a uniform rule throughout the country and it did not intend for state grace periods to be relevant under section 547. *In re Burnette, supra*, 14 B.R. at 801. Congress

set the grace period at ten days to correspond with the grace period provided under the Uniform Commercial Code. *See In re Walker, supra*, 161 B.R. at 495 (quoting White and Summers, *Uniform Commercial Code* § 25-7, 447-48 (3d ed. 1988). *See also Burnette, supra*, 14 B.R. at 800. Congress could have provided that each state's own version of Uniform Commercial Code Section 9-310(2) would be applicable. Then states, such as Oregon, could have adopted changes as they saw fit. However, Congress did not do this. Instead, it created one uniform grace period of ten days.

We also take note of Congress's enactment of the Bankruptcy Reform Act of 1994, which was signed into law on October 22, 1994. The Reform Act now allows a creditor twenty days to perfect its purchase money security interest while still qualifying for the enabling loan exception found in Section 547(c)(3). By this change, Congress acknowledged that states were enacting grace periods greater than ten days for such security interests. Congress could have deferred completely to the states by incorporating each state's own timing into the Code. Instead, it chose to continue having the Code itself dictate the applicable grace period. Furthermore, Congress did not amend Section 547(e)(1), which provides the definition for "perfection" as used in Section 547.

Even under the Reform Act then, if a creditor perfects its interest more then ten days after the transfer is effective between the parties, the transfer will be deemed made on the date of perfection, and a preference may therefore exist. If it is perfected within ten days, the transfer is deemed made as of the day it became effective between the parties. Under such circumstances, there will have been no transfer on account of an antecedent debt, and hence, no preference. The only difference under the new law is that lienholders asserting purchase money security interests, who perfect their interest within twenty days of the debtor taking possession of the property in question, may now be able to interpose Section 547(c)(3) as a defense to preference action. For all purposes of Section 547 though, be it to determine if there was a transfer on account of an antecedent debt or if the enabling loan exception applies, perfection is still determined pursuant to Section 547(e), and is still determined without any reference to state grace periods.

The Panel now applies this law to the facts at hand. The parties agree that Romania's application for a notation of the security interest on the certificate of title was marked October 31, 1991. Clearly then, since there is no other mark on it, the application was received by the DMV on that date, it

contained all the required information and it was accompained by all necessary documentations. The security interest was perfected on October 31, 1991. *See* O.R.S. 803.097(3). On that date, Romania cut off any possibility that a judicial lien creditor could obtain superior rights in the collateral. The relation back affect of C.R.S. § 79.3010(2) is inapplicable.

. . . .

The plain language of Section 547(e)(2) provides that a secured creditor will have a ten day grace period for perfecting its security interest. Pursuant to Section 547(e)(1), courts must look to state law to determine the moment in time in which the last step is taken to perfect a security interest. Varying grace periods provided for under state law are irrelevant. If the last necessary act was done within the ten day period of Section 547(e)(2)(A), the transfer will have been made when it became effective between the parties. If it is made after the ten day period, it will have been made when perfected under Section 547(e)(2)(B).

The security interest was effective between Loken and Romania on October 19, 1991. The DMV stamped Romenia's application as received on October 31, 1991. The security interest was perfected on that date. This was

> beyond the ten day grace period allowed. Therefore, under Section 547(e)(2)(B), the transfer of the security interest is treated as made on October 31, 1991, and not October 19, 1991. Consequently, the transfer was made on account of an antecedent debt under Section 547(b)(2) and that essential element of the preference claim was met.

Loken, 175 B.R. at 61-64.

The recent amendment to section 547(c)(3)(B), which extended the time period in which a lender may perfect its security interest from 10 to 20 days after the debtor receives possession of the property, is further support for the Court's conclusion that state law relation-back periods do not apply. As astutely noted by the bankruptcy court in *Walker*, 161 B.R. at 499, n.18:

> Interestingly, Senate Bill No. 540, a comprehensive set of amendments to the Bankruptcy Code currently under consideration in Congress. One such change proposed by the bill would be to extend the Section 547(c)(3) grace period to 20 days from the present 10 days because most states have now adopted longer periods for perfection of purchase money security interests. If Defendant's position is correct, and state relation back statutes are already operative under the statute, it is curious that some in Congress feel the need for an amendment to the Code. S. Rep. No. 103-168, 103d Cong. (1993).

See also H.R. Rep. 103-834, 103d Cong., 2d Sess. 20 (Oct. 4, 1994); 140 Cong. Rec. H10767 (Oct. 4, 1994) *reprinted in* Norton Bankruptcy Code Pamphlet p. 596 (1994-95 ed.) (The amendment to section 547(c)(3)(B) conforms bankruptcy law practices to most States' practice by granting purchase-money security lenders a 20-day period in which to perfect their security interest.").[1]

Here, there is no dispute that Beasley received possession of the 1994 Ford Probe on August 17, 1994. Pursuant to Missouri law, the security interest was perfected on September 7, 1994, or 21 days later, when Fidelity Financial mailed an application for Missouri Title and License noting the lien together with the requisite fee to the Missouri Department of Revenue. *See In re Schalk*, 592 F.2d 993, 996-97 (8th Cir. 1979) (applying Missouri law) (The security interest is perfected when the lender sends an application for a certificate of ownership noting the lien with the required fee to the Missouri Department of Revenue.); Mo. Rev. Stat § 301.600.2 (1994). The 30-day relation-back period prescribed in Mo. Rev. Stat. § 301.600.2 is inapplicable. Fidelity Financial perfected its lien beyond the 20-day relation-back period provided in section 547(c)(3)(B). Fidelity Financial's security interest in the 1994 Ford Probe is deemed avoided

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1. The Court has read Judge Federman's well written opinion in *In re Chambers*, 125 B.R. 788 (Bankr. W.D. Mo. 1991). In that case, the lender never sent the application for Missouri Title or the filing fee to the Missouri Department of Revenue. The lender was never shown as a lienholder on the title of the vehicle. When acknowledging that the lien was not perfected, Judge Federman noted that the lender failed to perfect the lien in accordance with the 30-day period prescribed in Mo. Rev. Stat. § 301.600, however, Judge Federman was not required to and did not address the issue presently before this Court.

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pursuant to section 547(b). The Court will set aside Fidelity Financial's lien as a voidable preference.

CONCLUSION

Based on the above discussion, the Chapter 13 Trustee's request for relief in his complaint is GRANTED. Fidelity Financial Services's lien is set aside as a voidable preference.

The foregoing Memorandum Opinion constitutes Findings of Fact and Conclusions of Law as required by Fed. R. Bankr. P. 7052.

So ORDERED this 14 day of July, 1995.

s/ Frank W. Koger
CHIEF BANKRUPTCY JUDGE

APPENDIX E — AMENDED JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI FILED AUGUST 28, 1995

UNITED STATES BANKRUPTCY COURT
For the Western District of Missouri

Case No. 94-43096-13

Adv. No. 95-4081-13

Richard Fink

Plaintiff(s)

v.

Fidelity Financial Services

Defendant(s)

AMENDED JUDGMENT

☒ This proceeding having come on for trial or hearing before the court, the Honorable Frank W. Koger, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered.

* * *

IT IS ORDERED AND ADJUDGED: the Chapter 13 Trustee's request for relief in his complaint is GRANTED. Fidelity Financial Services' lien is set aside as a voidable preference.

Appendix E

The foregoing Memorandum Opinion constitutes Findings of Facts and Conclusions of Law as required by Rule 7052, Rules of Bankruptcy.

ROBERT F. CONNOR
Clerk of Bankruptcy Court

[Seal of the U. S. Bankruptcy Court]

By: Michele Blodig
Deputy Clerk

Date of issuance: 8/28/95

Maureen Scully
Michael Gaughan
Richard Fink

APPENDIX F — JUDGMENT OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI FILED JULY 25, 1995

UNITED STATES BANKRUPTCY COURT
For the Western District of Missouri

Case No. 94-43096-13

Adv. No. 95-4081-13

RICHARD FINK

Plaintiff(s)

v.

FIDELITY FINANCIAL SERVICES

Defendant(s)

AMENDED JUDGMENT

☒ This proceeding having come on for trial or hearing before the court, the Honorable Frank W. Koger, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered.

* * *

IT IS ORDERED AND ADJUDGED: Fidelity Financial Service's lien is set aside as a voidable preference.

The foregoing Memorandum Opinion constitutes Findings of Fact and Conclusions of Law as required by Rule 7052, Rules of Bankruptcy.

Appendix F

ROBERT F. CONNOR
Clerk of Bankruptcy Court

[Seal of the U. S. Bankruptcy Court]

By: Michele Blodig
Deputy Clerk

Date of issuance: 7/25/95

Maureen Scully
Michael Gaughan
Richard Fink

APPENDIX G — STIPULATION OF FACTS OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF MISSOURI FILED JUNE 9, 1995

THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MISSOURI

Case No. 94-43096-1

Adversary Proceeding
No. 95 4081

In RE: Denise R. Beasley

Debtor

RICHARD V. FINK
CHAPTER 13 TRUSTEE

Plaintiff,

vs.

FIDELITY FINANCIAL SERVICES, INC.

Defendant.

STIPULATION OF FACTS

COME NOW Fidelity Financial Services, Inc. and Richard V. Fink, by and through their attorneys of record, and stipulate to the following:

1. On or about August 17, 1994, Fidelity Financial Services, Inc. ("Fidelity") financed the purchase of a 1994 Ford Probe, VIN #1ZDLT20A4R5133799, by Denise R. Beasley ("Beasley").

Appendix G

At that time, Beasley had possession of the vehicle and executed and delivered a Note in the amount of $14,090.80 at 20.85% and Security Agreement to Fidelity, a copy of which is attached hereto and incorporated herein by reference as Exhibit "A."

2. August 17 was the 229th day of 1994.

3. On or about September 7, 1994, 21 days later, Fidelity mailed an Application for Missouri Title and License (a "blue slip") to the Missouri Department of Revenue, together with the requisite fee. A copy of said Application is attached hereto and incorporated herein by reference as Exhibit "B."

4. The "blue slip" was subsequently processed by the Department of Revenue and returned to Fidelity with a "filed date" of September 23, 1994, 37 days after August 17. A copy of said filed Application is attached hereto and incorporated herein by reference as Exhibit "C."

5. At Fidelity's request, Susan M. Venturella, Senior counsel for the Missouri Department of Revenue, investigated the delivery date of the Application for Title, and determined that said Application was actually received by the Department of Revenue on September 12, 1994, 26 days after August 17. A copy of Susan Venturella's February 10, 1995 letter and the Department of Revenue's copy of the Application for Title, showing a "Received" date of September 12, 1994, is attached hereto and incorporated herein by reference as Exhibit "D."

6. On November 18, 1994, Beasley filed a Petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Western District of Missouri, and Gary D. Barnes was appointed interim Trustee.

Appendix G

7. November 18 was the 322nd day of 1994, 93 days after the transfer by Beasley of the security interest to Fidelity.

8. Fidelity is not an insider pursuant to 11 U.S.C. Section 547.

9. Fidelity filed a claim on December 16, 1994 in the amount of $14,670.15 but did not place a value on the security.

10. The parties agree that the value of the vehicle is $14,000.00.

11. The vehicle is fully insured and Fidelity Financial is listed as the loss payee.

12. At the 341 Meeting of Creditors on December 19, 1994, Gary D. Barnes, Trustee ("Barnes"), announced that he intended to file an adversary action to avoid Fidelity's lien because the Application for Title was received more than 20 days after the loan was made (despite the fact that Section 301.600 R.S.Mo. provides that a lien is perfected.

> ". . . by the delivery to the Director of Revenue [of] . . . an Application for Certificate of Ownership containing the name and address of the lienholder and the date of the Security Agreement, and the required Certificate of Ownership fee [and] is *perfected as of the time of its creation if the delivery of the aforesaid to the Director of Revenue is completed within 30 days thereafter, otherwise as of the time of delivery* . . ." (Emphasis added.)

13. The Trustee also demanded the debtor surrender the vehicle or pay the estate $2,500.00 and reaffirm the debt to Fidelity or convert to a Chapter 13, meet the best interest of creditors test, agree to refrain from filing a second bankruptcy for 180 days if the present case was dismissed, and pay the trustee his fees, estimated at $500.00, over three months.

14. Rather than accept any of these options, the Debtor converted these proceedings to a case under Chapter 13 on February 21, 1995, and filed a Plan proposing to avoid Fidelity's lien, to treat Fidelity as an unsecured claimant, and to pay the nonexempt value of the vehicle to her creditors pursuant to 11 U.S.C. Section 1305 (a)(4).

15. On March 30, 1995, Fidelity filed its Objection to Confirmation under 1325 (a)(5) of the Bankruptcy Code asserting that the Plan failed to provide for Fidelity to retain its lien and receive property of a value which is not less than the allowed amount of Fidelity's claim.

16. Also on March 30, the debtor announced at her Section 341 meeting that she wanted to have a ruling on whether the lien could be avoided in order to show good faith to the unsecured creditors. She said she understood that she would either pay Fidelity or the unsecured creditors the value of the vehicle.

17. Since the avoidance of the lien would benefit the estate the Trustee agreed to let counsel represent him in the effort to determine whether Fidelity had obtained a preference.

18. On or about June 7, 1995, Richard V. Fink, Chapter 13 Trustee, filed a Complaint to Set Aside Preference on the grounds that Fidelity did not perfect its lien on or before 20 days after

the Debtor received possession of the security, that the lien is therefore a transfer to Fidelity on account of an antecedent debt made while the Debtor was insolvent and enabling Fidelity to receive more than it would have received as an unsecured claimant.

19. This is a "core proceeding" within the meaning of 28 U.S.C. Section 157(b)(2)(f) over which the Court has jurisdiction of the subject matter.

20. Venue is properly laid in this Court pursuant to 28 U.S.C. Section 1409.

21. Defendant Fidelity's attorney has entered his appearance and accepts service on behalf of the defendant.

DYSART, TAYLOR, PENNER, LAY
& LEWANDOWSKI

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ATTORNEYS FOR FIDELITY
FINANCIAL SERVICES, INC.